RE SHIM LEE YUN (TRADING UNDER THE NAME & STYLE OF FAH SOON TRADING); EX P ALLIANCE BANK MALAYSIA BHD

HIGH COURT SABAH & SARAWAK, TAWAU
CHEW SOO HO J
[BANKRUPTCY PETITION NO: TWU-29-206-12-2011]
17 DECEMBER 2013

BANKRUPTCY: *Discharge – Conditional – Annulment of adjudication and receiving order – Whether debts paid in full – Whether Director General of Insolvency ('DGI') specified final debt for full settlement – Whether proper notice issued to judgment creditor – Whether judgment creditor agreed to final sum payable by respondent – Whether judgment creditor deprived of its rights to appeal against sum specified by DGI – Whether interest rate claimable – Whether barred by s. 6(3) Limitation Act 1953 – Whether judgment debtor allowed a conditional discharge subject to payment of balance interest due to judgment creditor – Bankruptcy Act 1967, ss. 43(6) & 105*

On 19 August 2013, the learned Senior Assistant Registrar ('SAR') allowed the judgment debtor/bankrupt/respondent's application for an order of annulment and rescission of the adjudication and receiving order dated 8 January 2013 pursuant to s. 105 of the Bankruptcy Act 1967 ('the Act') since the respondent had proved that the debts of the respondent were paid in full. In relation to the interest rate, the SAR's decision revealed that the DGI might have rejected the interest rate of 8% per annum from the appellant's claim after the expiration of six years from the date on which the interest became due under s. 6(3) of the Limitation Act 1953. Dissatisfied, the judgment creditor ('appellant') appealed to this court. It was contended that the alleged sum payable by the respondent to the appellant was issued by the Director General of Insolvency ('DGI') for the sum of RM127,475.41 which was not properly accounted for. Further, it was alleged that the DGI failed to issue a statutory notice to the judgment creditor under paras. 26 and 28 of sch. C of the Act since the appellant's proof of debt dated 12 March 2013 for the sum of RM251,358.53 had been reduced to the sum of RM127,475.41. The facts revealed that the sum of RM251,358,53 was derived from the judgment sum of RM144,974.82 and the interest was at the rate of 8% per annum. *Vide* the notice of rejection of proof of debt, the DGI rejected the sum of RM69,738 on the ground that the said sum had been paid as dividend through the bankrupt's estate. The appellant admitted that the sum of RM69,738 was rejected but contended that the DGI had to issue another notice of rejection of the proof of debt in the sum of RM54,145.12 in order to arrive at the final sum for the full settlement of RM127,475.41. The respondent argued that the appellant should have appealed against the DGI's notice of rejection of proof of debt

within 21 days from the date of the decision complained of under r. 186 of the Bankruptcy Rules 1969 ('the Rules'). The issues that arose for consideration were (i) whether the DGI had issued a proper notice under para. 26 of sch. C of the Act which specified the final debt for the full settlement to be RM127,475.41; (ii) whether the appellant was able to apply to court to reverse or vary the decision of the DGI; and (iii) whether there was any admission of the final debt for the full payment in the sum of RM127,475.51.

Held (allowing appeal in part):

(1) The respondent must satisfy the court that her debts were paid in full. The DGI's notice of rejection had complied with the requirements under paras. 26 and 28 of sch. C of the Act read together with r. 186 of the Rules in respect to the rejection for the sum of RM69,738. However, no notice of rejection for the sum of RM54,145.12 nor evidence to account for this sum that was discounted from the balance of RM251,358.53 after RM69,738 had been rejected and deducted. Further, no evidence was adduced as to the amount of interest that the DGI had rejected from the appellant's proof of debt nor any evidence that a notice of such rejection was issued to the appellant. (para 7)

(2) The appellant had acceded to the decision of the DGI in rejecting RM69,738 only. However, there was no evidence that the appellant had admitted to the sum of RM127,475.41 as its final claim for settlement by the respondent. Consequently, the appellant was deprived of its rights to appeal against the later decision in rejecting the sum of RM54,145.12 which was purportedly the rate and calculation of interest under s. 43(6) of the Act and s. 6(3) of the Limitation Act 1953 respectively. As such, it would be untenable to contend that the appellant ought to have appealed against or to have applied to set aside such decision when it was not put in writing to the appellant as creditor with its grounds. In the circumstances, the respondent failed to satisfy the court that she had made full payment to the appellant. (para 7)

(3) Section 43(6) of the Act applies in that "such interest or calculation shall for the purpose of dividend be calculated at a rate of not exceeding six per centum per annum". The parties should not contract out of the clear statutory provision which permits only 6% per annum. The Limitation Act 1953 does not apply to the State of Sabah and the applicable law is the Limitation Ordinance (Sabah Cap 72). The present law on interest claim by the judgment creditor in bankruptcy cases outside the three years period is no longer a bar. As such, the appellant was entitled to claim interest as provided in the statement of account. (paras 8 & 9)

(4) The respondent could not be said to have failed to settle the debts when she could only depend on the DGI to inform her of the final sum to be settled. The error appeared to be on the part of the DGI for his failure to give the creditor the further notice of rejection of the proof of debt leading to the final debt of RM127,475.41. It was just and equitable that the respondent be allowed a conditional discharge subject to the payment of the balance interest due to the appellant, taking into account the rate of interest to be at 6% per annum. Section 6(3) of the Limitation Act 1953 was not applicable in this case. (paras 10 & 11)

Case(s) referred to:
Perwira Affin Bank Bhd v. Mahany Sawal [2012] 6 CLJ 471 CA ***(refd)***
Re Gertrude Kho Lng Thai; Ex p AmFinance Bhd [2007] 10 CLJ 692 HC ***(refd)***
Re Lau Kah Chin; Ex p Tiong Hua Trading [2011] 1 LNS 9 HC ***(refd)***
Vilvanathan v. Official Assignee [1961] 1 LNS 150 HC ***(dist)***

Legislation referred to:
Bankruptcy Act 1967, ss. 42, 43(6), 105
Bankruptcy Rules 1969, rr. 183, 186
Limitation Act 1953, s. 6(3)

For the respondent/judgment debtor - Kusni Ambotuwo; M/s Kusni & Komariah
For the appellant/judgment creditor - Celestina Stuel Galid; M/s Jayasuriya Kah & Co

Reported by Kumitha Abd Majid

JUDGMENT

Chew Soo Ho J:

Introduction

[1] This appeal *vide* encl. 46 is filed by the judgment creditor/the appellant against the decision of the learned Senior Assistant Registrar ("the SAR") made on 19 August 2013 in allowing the application by the judgment debtor/bankrupt/the respondent for an order of annulment and rescission of the adjudication and receiving order dated 8 January 2013 ("the said order") pursuant to s. 105 of the Bankruptcy Act 1967 (Act 360) that the respondent has proved to the satisfaction of the court that the debts of the respondent are paid in full.

[2] The appellant's principal ground of appeal is basically that the alleged sum payable by the respondent to the appellant issued by the Director General of Insolvency (the 'DGI') in the sum of RM127,475.41 *vide* the DGI's letter dated 12 June 2013 is not properly accounted for as the full amount of settlement and that the DGI has failed to issue a statutory notice to the judgment creditor under para 26 and 28 of Schedule C of the Bankruptcy Act 1967 that the appellant's proof of debt dated 12 March 2013 of RM251,358.53 had been reduced to the said sum of RM127,475.41 and how this final sum was derived at.

[3] Respondent contended that although it was willing to pay the agreed sum of RM144,074.82 to the appellant, the DGI had nevertheless admitted the sum of RM127,475.41 and hence the respondent had settled in full the sum of RM127,475.41 as per the admitted proof of debt. Secondly, respondent contended that if the appellant was not satisfied with the notice of rejection of the proof of debt under s. 42 Schedule C of the Bankruptcy Act 1967, appellant should have appealed to the court against the notice of rejection of the proof of debt by the DGI within 21 days from the date of the decision complained of under r. 186 of the Bankruptcy Rules 1969 read with r. 183. Without the decision of the DGI being set aside, the rejection of appellant's proof of debt shall remain. It was also contended that one of the defendants in the same suit where judgment was entered along with the respondent was discharged as bankrupt upon payment of RM50,000 only.

The Issues

[4] It is apparent from the facts of this appeal that the appellant is challenging the debt that represents the full amount still due and payable by the respondent as judgment debtor/bankrupt to the appellant as judgment creditor for which appellant contended that the DGI had failed to account how the said sum of RM127,475.41 was arrived at and no notice in writing stating the said amount was given to the appellant. Respondent contended that appellant ought to have appealed against the rejection of the proof of debt which purportedly led to the said sum of RM127,475.41 being the sum determined by the DGI as the sum for full settlement of the debt still due and owing. Hence, the primary issue is whether the DGI in rejecting the appellant's proof of debt had issued a proper notice under para 26 Schedule C of the Bankruptcy Act 1967 specifying the final debt for full settlement to be RM127,475.41 and its grounds thereof to enable the appellant to apply to the court to reverse or vary the decision of the DGI should appellant decline to accede to it.

[5] The second issue is whether there was any admission of the final debt for purpose of full payment in the sum of RM127,475.41.

[6] On the respondent's contention of another defendant in the same judgment being discharged as a bankrupt upon payment of RM50,000, I find this to be non-issue and do not find the necessity to deliberate on non-issue since it relates to another party.

Findings Of Court

[7] There is no dispute between the parties herein that the respondent was relying on the second limb of s. 105 of the Bankruptcy Act 1967 to apply for annulment and rescission of the adjudication and receiving order ("AO & RO") adjudged against her for the debt due to the appellant. By this second limb of the provision, the respondent must satisfy the court that her debts are paid in full. From the proof of debt affirmed by the appellant's

vice president on 12 March 2013 (exh. "COL1"), it was stated that the respondent trading under the name of Fah Soon Trading was at the date of the AO & RO dated 8 January 2013 still indebted to the appellant in the sum of RM251,358.53 on the judgment in Summons No. TSC(52) 401 of 2006. This sum of RM251,358.53 was made up from the judgment sum of RM144,974.82 and agreed interest on the sum of RM144,974.82 at the rate of 8% per annum from 6 November 2013 to 8 January 2013 amounting to RM106,383.71 (see the statement of account dated 8 January 2013 annexed to exh. "COL1"). The DGI *vide* his "Notice Penolakan Bukti Hutang" (Notice of Rejection of Proof of Debt) dated 25 March 2013 stated that the DGI as receiver of the respondent, had rejected the sum of RM69,738 on grounds that the said sum of RM69,738 had been paid as dividends through the bankruptcy's estate. Notice was given therein to the appellant that if appellant was not satisfied with the DGI's decision aforesaid, they should apply to the court to reverse or vary such decision within 21 days from the date of such notice failing which such application would not be entertained. In so far as this notice of rejection of proof of debt dated 25 March 2013 is concerned, there is no issue that the DGI had complied with the requirements under para 26 and para 28 in Schedule C of the Bankruptcy Act 1967 of the rejection to be in writing to the creditor together with the grounds of the rejection and that the creditor may apply to the court to reverse or vary the decision of the DGI if the creditor is dissatisfied with such decision. As to the appeal period of 21 days, r. 186 of the Bankruptcy Rules 1969 provides that "subject to the power of the court to extend the time no application to reverse or vary the decision of the official assignee in rejecting a proof shall be entertained after the expiration of 21 days from the date of the decision complained of." Hence, DGI's notice of rejection is seen to have complied with the requirements under para 26 and 28 of Schedule C read with rule 186 of the Bankruptcy Rules in respect of the rejection of the sum of RM69,738. Appellant in fact admitted to this sum of RM69,738 to be rejected but contended that the sum still due and owing by the respondent after RM69,738 was deducted from the initial debt of RM251,358.53 would not leave the sum of RM127,475.41; the DGI would need to issue another notice of rejection of the proof of debt in the sum of RM54,145.12 in order to arrive at the final sum for full settlement of RM127,475.41. It is apparent from the evidence that there was no such notice of rejection of the sum of RM54,145.12 nor evidence to account for this sum that was discounted from the balance of RM251,358.53 after RM69,738 having been rejected and deducted. From the learned SAR's grounds of judgment dated 19 August 2013 ("Tab-2") annexed to the appellant's submission, it would appear that the DGI might have rejected the interest rate of 8% per annum on appellant's claim for interest which shall be calculated at a rate of not exceeding 6% per annum under s. 43(6) of the Bankruptcy Act 1967 as well as the arrears of interest in respect of any judgment debt after the expiration of six years from the date on which

the interest became due under s. 6(3) of the Limitation Act 1953 (Act 254). However, there is no evidence as to the amount of interest that the DGI had rejected from appellant's proof of debt nor any evidence that a notice of such rejection was issued to the appellant. The authority cited by learned counsel for the respondent and accepted by the SAR namely *Vilvanathan v. Official Assignee* [1961] 1 LNS 150; [1970] 1 MLJ 237 where Azmi J (as His Lordship then was) held *inter alia* that "it would still be necessary for the applicant to have the decision made by the assistant official assignee set aside and so long as that decision stands the applicant cannot file a fresh one in the same manner …", to this court, is not applicable in the instant appeal for simple reason that the appellant agreed with the decision of DGI in his rejection of RM69,738 but there is no notice of rejection of the sum of RM54,145.12 pursuant to para 26 and 28 of the Schedule C of Bankruptcy Act 1967 read with r. 186 Bankruptcy Rules 1969. Consequently, appellant is deprived of its right to appeal against the later decision in rejecting the sum of RM54,145.12 purportedly to be the rate and calculation of interest under s. 43(6) Bankruptcy Act 1967 and s. 6(3) Limitation Act 1953 respectively. Flowing from that, it will be untenable to contend that the appellant ought to have appealed against or to have applied to set aside such decision when such decision was not put in writing to the appellant as creditor with its grounds. From the evidence, it is clear that appellant had acceded to the decision of the DGI in rejecting RM69,738 only but there was no decision of rejection of RM54,145.12 or communication of admission of RM127,475.41 by the DGI to the appellant under para 26 and 28 Schedule C of the Bankruptcy Act 1967. There is no evidence that the appellant had admitted the sum of RM127,475.41 as its final claim for settlement by the respondent. In the circumstances, respondent would have failed to satisfy the court that she had made full payment to the appellant in the true sense.

[8] Reverting to the question of interest chargeable, I am inclined to agree that s. 43(6) of the Bankruptcy Act 1967 applies in that "such interest or calculation shall for the purposes of dividend be calculated at a rate of not exceeding 6% per annum." Although in the statement of account as annexed to the appellant's proof of debt *vide* "COL1" states the interest to be "Agreed interest…at the rate of 8% per annum", I hold the view that parties should not contract out of the clear statutory provision which permits only 6% per annum.

[9] Limitation Act 1953 which the DGI purportedly relied on to reject certain part of the interest payable to the appellant and which the learned SAR found favour, does not apply in the State of Sabah. The applicable law is Limitation Ordinance (Sabah Cap 72) which has no equivalent of s. 6(3) Limitation Act. The present law on interest claim by the judgment creditor in bankruptcy cases outside the three years period is no longer a bar; see

the cases of *Perwira Affin Bank Bhd. v. Mahany Sawal* [2012] 6 CLJ 471 CA; *Re Gertrude Kho Lng Thai; Ex p AmFinance Bhd* [2007] 10 CLJ 692 and *Re Lau Kah Chin; Ex p: Tiong Hua Trading* [2011] 1 LNS 9 as cited by Ravinthran Paramaguru J in his decision in Sandakan High Court Suit No SDK-29-15/2-2012, dated 25 January 2013. Appellant in the instant case is therefore entitled to claim interest from 6 November 2003 to 8 January 2013 as shown in its statement of account above.

[10] Having considered all evidence, I find doubt as to the said full sum of settlement of RM127,475.41 to be the actual sum still due and owing to the appellant. Nevertheless, the respondent cannot be said to have failed to pay in settlement of the debts when she could only depend on the DGI to inform her of the final debt to be settled and she had paid according to what the DGI had so notified. The error appears to me to be on the part of the DGI in the failure to give the creditor the further notice of rejection of the proof of debt leading to the final debt of RM127,475.41. Perhaps, if the DGI had come up with the proper calculation, respondent could have made the correct full payment. In the interest of justice, I do not think that the respondent ought to be penalised to be made an undischarged bankrupt again.

[11] For the foregoing reasons, I find it just and equitable that the respondent is allowed a conditional discharge subject to the payment of the balance of the interest due to the appellant having taken into account the rate of interest to be at 6% per annum but without s. 6(3) of Limitation Act 1953 which is not applicable in Sabah to be invoked and applied in this case.

[12] Consequently, I allow this appeal in part as above and make no order as to costs in the circumstances. Learned SAR's order is substituted as I have so ordered above.